# APPENDIX

## DEPARTMENT OF HEALTH EDUCATION AND WELFARE

October 30, 1978

Dear _____:

Secretary Califano has asked me to respond to your October 10 letter to him requesting an opinion as to the legality of certain hospital practices under the Medicare-Medicaid Anti-Fraud and Abuse Amendments, P.L. 95-142.

In the correspondence attached to your letter, questions a situation wherein a remote, rural hospital in California in an effort to induce physicians to practice in the area, guarantees a portion of the physician's salary for one year. There is no explicit agreement with the hospital that the physician must refer his Medicare or Medi-Cal patients (or any of his patients) to that particular hospital. However, since this rural hospital is the nearest within 50 miles, it is most likely that the physician's patients who must be hospitalized would be referred to the local hospital. Specifically, inquiries whether such an arrangement would be a violation of Section 1877(b)(2) of the Social Security Act (42 U.S.C. 1395nn(b)(2)). Since Section 1877(b) is a penal provision, a conclusive determination to whether this or any other arrangement violates the section can only be rendered by the courts. We can, however, offer out thoughts on particular aspects of the arrangement we believe are important in making a determination whether it would be prohibited under the Act.

Since 1972, the Social Security Act has provided specific penalties for transgressions against the Medicare or

Medicaid programs for certain practices that have long been regarded by professional organizations as unethical, which are unlawful in some jurisdictions, and which contribute significantly to the cost of the programs. For example, kickbacks are illegal and improper no matter how a transaction might be construed to obscure the true purpose of a payment. The concern of both Congress and the health care programs administered by the Department of Health, Education, and Welfare is the unnecessary and illegal escalation of health care costs which result from the type of practices prescribed by the anti-Kickback or Rebates Provision (42 U.S.C. 1395nn and 1396h).

In the Medicare-Medicaid Anti-Fraud and Abuse Amendments (P.L. 95-142) Congress acted to clarify, restructure, and strengthen the penalty provisions included in the Social Security Act. Thus, Sections 1877(b)(2) and 1909(b)(2) of the Act were amended to provide:

> Whoever offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person--
>
> (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whose or in part under this title, or
>
> (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service or item for which payment may be made in whole or in part under this title,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

The intent of these provisions is not to penalize individuals or entities participating in legitimate business transactions. Rather it is to penalize those who engage in unethical and illegal financial arrangements (such as kickbacks, rebates, or bribes) that unnecessarily increase the costs of Federal health care programs. Many business offer financial inducements to attract competent personnel. The physician recruitment program acts to insure adequate and competent medical care in a remote, rural area. Moreover, the costs of the recruitment program are not reimbursable by either Medicare or Medicaid. This, based on description of the arrangement (a hospital guarantees a portion of physicians' salaries for one year in order to have them practice in the area serviced by the hospital), it would appear that neither the hospital nor the physicians would be in violation of these penal provisions of the Social Security Act.

You, of course, understand that our reply is predicated on an understanding of the arrangement as we interpret letter. If facts or conditions differ from those we understand or infer, there is a possibility that the arrangement might be in violation of the subject provisions of the Act. Should any questions arise to the propriety of an arrangement, or regional office will consult with the appropriate we trust that our comments will be helpful in responding to [_____] questions.

Sincerely yours,

Don Nicholson
Director
Office of Program Integrity